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IN THE

Supreme Court of the United States

October Term, 1936

No. 18

THE PEOPLE OF PUERTO RICO, *Petitioner,*

vs.

THE SHELL CO. (P. R.) LIMITED *Et Al., Respondents.*

BRIEF FOR THE RESPONDENTS

The Texas Co. (P. R.), Inc., West India Oil Co., Robert E. Bushby, Benjamin Arkin, R. H. Downing, Enrique Hernández Acosta, Charles H. Lee, Antonio Magriñá, Andrés López de Haro and José Noya, in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

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of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF CASE	2
QUESTION PRESENTED	4
STATUTES INVOLVED	6
SUMMARY OF ARGUMENT	9
ARGUMENT	12-33
POINT I—The Sherman Act supersedes or abrogates the insular restraint of trade act because there is an actual conflict between them	12
POINT II—The Grafton case has no application	17
POINT III—The Gutiérrez case and the Railroad Safety Appliance cases and other cases decided by this Court have settled the law contrary to the petitioner's contentions	19
POINT IV—The Territorial cases relied upon by the petitioner are clearly distinguishable from this case	27
POINT V—The authorities relied upon by the petitioner which arose in territories that are now states are not applicable to Puerto Rico or to the facts in this case	29
POINT VI—The Federal Criminal Code relating to adultery, bigamy, incest, etc., where the United States has exclusive jurisdiction has no application to the insular possessions of Puerto Rico and Hawaii	31
POINT VII—The question raised by this petition and the record is not special nor important and there is no reason why it should be reviewed by this Court	33
CONCLUSION	34

Table of Cases.

	PAGE
Chouteau v. Rice, 1 Minn. 192	30
Cochran v. United States, 147 F. 206	30
Davis v. Beason, 133 U. S. 333	13, 19, 22, 33
Domenech v. National City Bank, 294 U. S. 199	19, 22, 33
El Paso and Northeastern Railway Co. v. Gutiérrez, 215 U. S. 87	10, 13, 14, 19, 20, 21, 33
Grafton v. United States, 206 U. S. 333	10, 17, 18, 19, 28
In re Osterhaus, Fed. Cas. #10609	30
In re Terrell, 144 F. 616	30
Johnson v. United States, 6 Utah 403, 24 Pac. 256	30
New York Central v. Winfield, 244 U. S. 147	23, 26, 33
Railway Safety Appliance cases	10, 17, 33
Santa Fe R. Co. v. Friday, 232 U. S. 694	16
Southern Railway Co. v. Railroad Com. of Indiana, 236 U. S. 439, 446	23, 24
Southern Railway Co. v. Reid and Beam, 222 U. S. 444 at 447	23, 26
Spokane & Inland R. R. v. Campbell, 241 U. S. 497, 511	23
Territory v. Long Bell Lumber Co., 22 Okla. 890, 99 Pac. 911	27
Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 41	23, 25
United States v. Bisel, 8 Montana 20, 19 Pac. 251	30
United States v. Ensign, 2 Montana 396	30
United States v. Flaherty, 8 Montana 31, 19 Pac. 553	30
United States v. Haskins, Fed. Cas. #15322	30
United States v. Mays, 1 Idaho 763	30
United Theatres, Inc. v. Court, 47 D. P. R. 725	3
Wagner v. Minnie Harvester Co., 25 Okla. 558, 106 Pac. 969	27
Welty v. United States, 14 Okla. 7, 76 Pac. 121	30

Statutes.

PAGE

Code of the United States, Territories and Possessions (48 U. S. C. A. 492, 731) 32

Criminal Code of United States (18 U. S. C. A. 511-523) 31, 32

Jones Act of March 2, 1917 (Organic Act of Puerto Rico)

Section 9 (48 U. S. C. A. 734) 8
Section 41 (48 U. S. C. A. 863) 8, 15, 29
Section 10 9

Judicial Code of the United States (28 U. S. C. A. 41) 8, 15, 19, 29

Puerto Rico Restraint of Trade Act of March 14, 1907 (Revised Statutes of Puerto Rico 2373, 2374 and 2375) 7, 14, 15

Revised Statutes of Puerto Rico

Section 2373-2375 ..... 7, 14, 15
Section 5711, 5712 32
Section 5713-5716 32
Section 5717 32
Section 5725 31

Rules of the Supreme Court of the United States, Rule 38(5) 33

Sherman Anti-Trust Act (15 U. S. C. A. 3, 4) 6, 9, 14, 15

IN THE

Supreme Court of the United States

October Term, 1936

No. 842

THE PEOPLE OF PUERTO RICO, *Petitioner,*

vs.

THE SHELL CO. (P. R.) LIMITED *Et Al., Respondents.*

BRIEF FOR THE RESPONDENTS

The Texas Co. (P. R.), Inc., West India Oil Co., Robert E. Bushby, Benjamin Arkin, R. H. Downing, Enrique Hernández Acosta, Charles H. Lee, Antonio Magriñá, Andrés López de Haro and José Noya, in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the insular District Court (R. 27, "Judgment") is not officially reported. The opinion of the insular Supreme Court (R. 36-45) is officially reported in 49 P. R. Dec. 226 (Spanish Edition). It has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 49-61) is reported in 86 F. (2d), 577.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Statement of Case.

On July 13, 1934, the plaintiff filed in the District Court for the Judicial District of San Juan, Puerto Rico, its amended information against the defendants alleging that during the year immediately preceding this action the defendants had committed the following illegal acts in the judicial district of San Juan in violation of the act entitled "An Act to protect the commerce against unlawful restraints and monopolies" approved by the Legislative Assembly of Puerto Rico on March 14, 1907 (R. 1-5):

> (1) Conspiracy and agreed plan to restrain and prevent free competition among the corporation defendants for the purpose of preventing competition in the business and contracts for the distribution and sale of gasoline.
>
> (2) Agreed to fix uniform and arbitrary prices at which gasoline should be sold at wholesale and retail.
>
> (3) Agreed to sell only to those dealers who would agree to retail at prices fixed by the defendants and forcing them to sell at retail at those fixed prices.
>
> (4) Agreed, established and imposed penalties and fines on dealers who sold below the price fixed by the defendants which consisted in cutting off the supply of gasoline and eliminating the dealer from the business.

The defendants demurred (R. 8 and 25) on the ground among others, that the District Court of San Juan had no jurisdiction to entertain this proceeding because the Puerto Rico Act of March 14, 1907, has never been in force and is null and void for the reason that Puerto Rico has no power

to legislate on a matter over which the Congress of the United States has already legislated.

On December 22, 1934, the District Court of San Juan entered judgment sustaining the demurrers and dismissing the information on the ground that the Puerto Rico Act of March 14, 1907, was not in force in Puerto Rico because the Sherman Act of 1890 supplemented by the Clayton Act of 1914 of the Congress of the United States covered the entire field of the local act and that the offense alleged was within the jurisdiction of the District Court of the United States for Puerto Rico (R. 27).

The plaintiff appealed to the Supreme Court of Puerto Rico and after the appeal was perfected the defendants filed motions to dismiss the appeal (R. 33) on the ground that the Supreme Court of Puerto Rico had already determined in prior cases that the Puerto Rico Act of March 14, 1907, was not in force because the Sherman Act and the Clayton Act covered the field. On December 2, 1935, a hearing was held (R. 36) before the Supreme Court of Puerto Rico on the motions to dismiss and after presentation of oral argument and briefs by both sides, the Supreme Court rendered its opinion (R. 36) and entered its order (R. 45) dismissing the appeal on December 20, 1935. This opinion held that the Sherman Act covers the entire ground of the local statute and that once the Congress has legislated upon a particular subject, Puerto Rico cannot legislate on the same subject, and that it confirmed its decision in the case of *United Theatres Inc.* v. *Court,* 47 D. P. R. 725 (R. 41) set forth on page 59 of petitioner's brief. The plaintiff appealed to the Circuit Court of Appeals for the First Circuit and that court in its judgment of November 20, 1936 affirmed the judgment of the Supreme Court of Puerto Rico with costs to the appellees (R. 61), and in its

opinion held that the provisions of the insular anti-trust act were not merely supplementary to the Sherman Act but that both acts cover the same ground of legislation and that the insular act was in conflict with the provisions of the Sherman Act and supersedes and invalidates the local act and that the island district court was without jurisdiction over the offense (R. 53, 58). The opinion pointed out that the conflict between the two acts was that the insular act gave jurisdiction to the insular courts for the same offenses that the federal Sherman Act denounced as a crime, for the prosecution of which the federal District Court of Puerto Rico has original and exclusive jurisdiction under the Sherman Act (R. 53, 58).

Question Presented.

The *general* question is whether or not the local anti-trust act of the legislature of Puerto Rico approved March 14, 1907 is a valid statute particularly in reference to section one thereof. However, the *specific* question presented by this petition for a writ of certiorari is whether the Circuit Court of Appeals was wrong in deciding that the local anti-trust act conflicts with the Sherman Act on the ground that the Sherman Act gave exclusive and original jurisdiction for the acts charged in the information to the United States District Court for Puerto Rico whereas the insular act attempts to place such jurisdiction in the local insular courts (R. 53, 58), and by inference to oust the jurisdiction of the United States District Court for Puerto Rico.

It is important to state the question specifically because the petitioner throughout its brief admits that if there is a conflict between the two pieces of legislation that the federal act must supersede or set aside the local insular legisla-

tion. (See petitioner's brief, pages 17, 23, 24, 29, 31 and 38).

The contention of the petitioner, in brief, is that the federal and insular acts are not in conflict, irrespective of the decision of the Circuit Court of Appeals to the contrary, and that since they are not in conflict, that federal and insular anti-trust legislation, both imposing penalties for the violation of the same acts can stand side by side in Puerto Rico. By the use of the word "conflict" both the Circuit Court of Appeals and the petitioner mean that the two acts are inconsistent or that the insular act provides for doing something which is forbidden by the federal law.

If the Circuit Court of Appeals was wrong in holding there is a conflict between the two acts in the sense stated above, there is a further question, namely: Can the decisions of the three lower courts be sustained on the ground that when the Congress exercises its paramount authority as the sovereign power over an insular possession and undertakes to regulate the subject, the field is occupied and the inferior authority cannot regulate the subject matter, neither in conflict with nor in consonance with the Congressional regulation.

However, it is the contention of the respondents that this general question does not arise from the record as the lower Court decided the case on other grounds and that the only question before this Court on this petition is a narrow and limited one, namely, was the Circuit Court of Appeals correct in finding as a matter of fact and law that there was an actual conflict between the federal and insular statutes? It is also the position of the respondents that such a narrow question is not a desirable subject for consideration by this Court on a writ of certiorari.

Statutes Involved.

The following statutes are deemed necessary for the consideration of the petition:

Sections 3 and 4 of the Sherman Anti-Trust Act, approved July 2, 1890, entitled "Monopolies and Combinations in Restraint of Trade" (15 U. S. C. A. 3):

> "3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, sec. 3, 26 Stat. 209.)
>
> "4. Jurisdiction of courts; duty of district attorneys; procedure. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

Sections 1, 2 and 3 of the Puerto Rico Act of March 14, 1907, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (Revised Statutes of Puerto Rico 2373, 2374 and 2375):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.
>
> "Section 2. Every person who shall monopolize or attempt to monopolize or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Porto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.
>
> "Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. When the parties complained of shall have been duly notified, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such proceedings and before final decree, the court may make such temporary restraining order or prohibition as shall be deemed just in the premises."

Section 9 of the Jones Act approved March 2, 1917 (39 Stat. 954; 48 U. S. C. A. 734):

> "United States laws extended to Porto Rico; internal revenue receipts covered into treasury. The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States except the internal revenue laws; Provided, however, That all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Porto Rico. (Apr. 12, 1900, c. 191, sec. 14, 31 Stat. 80; Mar. 2, 1917, c. 145, sec. 9, 39 Stat. 954.)"

Section 41 of the Jones Act of March 2, 1917, c. 145, 39 Stat. 965, (48 U. S. C. A. 863):

> "That Puerto Rico shall constitute a judicial district to be called 'the District of Puerto Rico'.—The District Court for said district shall be called 'The District Court of the United States for Puerto Rico' —Such district court shall have jurisdiction over all cases cognizable in the district courts of the United States, and shall proceed in the same manner."

Section 24 of the Judicial Code of the United States (28 U. S. C. A. 41):

> "Sec. 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:
>
> "(2) Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States."

Section 10 of the Jones Act of March 2, 1917 for Puerto Rico:

> "That all judicial process shall run in the name of 'United States of America SS. the President of the United States' and all penal or criminal prosecution in the local courts shall be conducted in the name and by the authority of 'The People of Puerto Rico' ".

Summary of Argument.

1. That the decision of the Circuit Court of Appeals rests on the narrow ground that there is a conflict between the federal Sherman Act and the insular restraint of trade act, and not on the broader ground that when federal legislation covers the field that consonant insular legislation must give way to the sovereign power of Congress.

2. That the petitioner admits that the primary purpose of the local insular law is to make the same offenses as are punishable by the federal act, punishable in the local insular courts, and further admits that if there is a conflict between the federal and insular laws in the sense that they are inconsistent and not consonant one with the other, that the federal act supersedes or abrogates the insular law.

3. That the record and the brief of the petitioner demonstrate that there is a plain conflict between the federal and the local law in that the original and exclusive jurisdiction of the United States District Court for Puerto Rico relating to the acts charged in the information given to this Court by the Sherman Act, is interfered with and countervened by the local insular act attempting to give to the local insular courts jurisdiction over the same subject matter covered by the Sherman Act.

4. That none of the authorities relied upon by the petitioner have any application if the Circuit Court of Appeals was correct in deciding that the two laws are in conflict.

5. That the *Grafton* case (206 U. S. 333) has no application.

6. That the *Gutiérrez* case (215 U. S. 87) the *Railroad Safety Appliance* cases and other cases (*infra*, Point III) decided by this Court have settled the law contrary to the petitioner's contentions.

7. That the territorial cases relied upon by the petitioner are clearly distinguishable from this case.

8. The authorities relied upon by the petitioner which arose in territories that are now States are not applicable to Puerto Rico or to the facts in this record because:

(a) The insular possession of Puerto Rico has an entirely different system of insular and federal courts than the territories which have now become States. The territorial courts also had jurisdiction of offenses against the United States and applied thereto territorial rules of practice and procedure. Puerto Rico has a separate United States District Court for Puerto Rico independent of the local insular courts with exclusive jurisdiction over federal offenses and applying federal criminal procedure and practice. (See page 8, *supra*.)

(b) The question in the instant case that the insular courts of Puerto Rico do not have jurisdiction

of an offense over which the United States District Court for Puerto Rico was given exclusive jurisdiction under the federal Sherman Act, did not arise in the territorial cases relied upon by the petitioner.

9. The federal criminal code relating to adultery, bigamy, incest, etc. where the United States has exclusive jurisdiction have no application to the insular possessions of Puerto Rico and Hawaii.

10. The question raised by this petition and the record is not special nor important and there is no reason why it should be reviewed by this Court:

(a) This Court does not review a conflict between a Circuit Court of Appeals and territorial decisions.

(b) There is no conflict between the decision of the Circuit Court of Appeals and the territorial cases relied upon by petitioner.

(c) The question raised has been settled by this Court.

(d) The decision of the Circuit Court of Appeals that there was an actual conflict is not a reason for review by this Court.

(e) The contention of the petitioner that the question is of wide general interest because the lower decision will apply to other criminal laws of the territories, is without merit.

ARGUMENT.

POINT I.

The Sherman Act supersedes or abrogates the Insular Restraint of Trade Act because there is an actual conflict between them.

The Circuit Court of Appeals rests its decision on the ground that the Sherman Act preempted the ground or superseded the local act relating to the same matter because the *act charged* in the information and denounced as a crime by the island statute and over which the insular courts are given jurisdiction, is the same as that denounced as a crime in the Sherman Act, over the prosecution of which the federal District Court for Puerto Rico has original and exclusive jurisdiction (R. 58). The lower Court noted that Section 1 of the local act makes the same act or acts criminal in Puerto Rico that Section 3 of the Sherman Act, also in force in Puerto Rico, likewise makes criminal there, and that jurisdiction of the offenses denounced in the local act is conferred upon the island district courts, while jurisdiction of the offenses denounced by the Sherman Act is conferred on the federal District Court for the island (R. 53). The Court said:

> "In this situation it can hardly be said that these provisions of the Act of 1907 are merely supplementary to the provisions of the Sherman Act and do not cover the same ground and conflict with its provisions. As these provisions of the two acts, both of which relate to Puerto Rico, cover the same ground and are necessarily in conflict with one another, does the act of Congress supersede or invalidate the local act?" (R. 53).

The petitioner must stand or fall with its contention that no actual conflict exists between the two acts, for throughout its brief it states that if the two acts are not in harmony and the local act does not supplement the federal act but conflicts with it, that the insular legislation must be superseded or abrogated by the superior power of the congressional legislation. On page 17 of the petitioner's brief it is stated that the general rule is that the act of any inferior legislative body must give way to that of the superior authority when the two statutes are *necessarily* in conflict in so far as the necessary conflict between them extends.

On page 23 of the petitioner's brief, it states that if the police power of a State or Territory be in conflict or inconsistent with congressional legislation, the local state or territorial statute must give way.

The petitioner in its footnote on page 29 of its brief in discussing the case of *Davis* v. *Beason,* 133 U. S. 333, states that the police power of a State or Territory is not abrogated by implication except in so far as any local legislation may be in conflict with, or inconsistent with an act of Congress.

On page 31 of its brief, the petitioner admits that the local statute must give way to the federal law when the former prescribes any rule of action *contradictory in any way to,* or inconsistent with, any rule of action prescribed by the federal statute.

On page 38 of its brief, the petitioner, referring to the following quotation from *El Paso & Northeastern Ry. Co.* v. *Gutiérrez,* 215 U. S. 87:

> "In view of the plenary powers of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and

> prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaken to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject'',

said that the above quotation from the *Gutiérrez* case meant only that the territorial legislation was superseded by the later federal act in so far as the federal act was necessarily in conflict with the territorial statute, and therefore to that extent necessarily amended or repealed it by implication.

It is important to refer to these parts of the petitioner's brief in order to define the position of the petitioner, which appears to be that the two statutes are not necessarily in conflict, although the lower Court held directly to the contrary. Let us see if the decision of the lower Court was correct.

The information in the present case (R. 1-4) is brought under Section 1 of the local act (*supra,* p. 7) and charges a conspiracy in restraint of trade. Section 3 of the Sherman Act (*supra,* p. 6) defines and punishes the same offense. Each law provides that the act with which the defendants are charged in this information shall constitute a misdemeanor and the punishment fixed by the two statutes for this criminal act is identical. There is nothing in the information charging the defendants with any offense other than the offense referred to in Section 3 of the Sherman Act. In fact, Section 1 of the P. R. Act is almost a repetition of the words contained in Section 3 of the Sherman Act. What we want to stress is that this is not a prosecution under some section of a local insular law going beyond the federal act and covering matters not covered by the federal act. It is a prosecution for the precise act which the federal law declares to be a misdemeanor and the precise act

for which the Congress has decreed a certain punishment and has decreed that that punishment be imposed exclusively by the District Court of the United States for Puerto Rico. Even if the P. R. act did contain additions to the federal act this would make no difference in the case at bar, because this prosecution is not brought under any such new provision but is a prosecution for the precise crime described in the federal act.

The two acts are alike with one important exception, which we will now consider.

The Congress gave original and exclusive jurisdiction over suits and prosecutions under the Sherman Act to the District Courts of the United States by Section 4 thereof which provides that such courts are invested with jurisdiction to prevent and restrain violations of Section 3, and it shall be the duty of the United States attorneys to institute proceedings in equity to prevent and restrain such violations (*supra*, p. 6). By the Judicial Code of the United States and the Organic Act of Puerto Rico, the Congress gave exclusive and original jurisdiction of such suits and prosecutions in Puerto Rico to the District Court of the United States for Puerto Rico (*supra*, p. 8).

However, the local P. R. Act purports to give jurisdiction of such suits and prosecutions to the insular district courts which are separate and distinct from the United States District Court for Puerto Rico. Section 3 of the local P. R. Act (*supra*, p. 7) provides that the district courts of the Island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law, and it shall be the duty of the attorneys of the district courts of the Island to institute proceedings of injunction or any other civil proceedings to prevent, prohibit, enjoin and restrain such violations.

The paramount power of Congress over Puerto Rico having spoken to invest the United States District Court for Puerto Rico with exclusive and original jurisdiction of criminal cases under the Sherman Act, the attempt of the Legislature of Puerto Rico to also invest jurisdiction over identical offenses in the insular courts is in direct contravention and conflict with the mandate of Congress that such cases shall be determined in the Puerto Rico federal court and is an attempt by the Legislature of Puerto Rico to do a thing forbidden by the Congress.

The case of *Santa Fe Ry. Co.* v. *Friday*, 232 U. S. 694, 698, is in point and is referred to by the lower Court in its opinion (R. 54), this Court holding that jurisdiction of the federal district court of a territory is original and exclusive over an action arising under the Employers' Liability Act of the Congress, which the legislature of the territory could not take away if it attempted to do so.

Since there is necessarily a conflict between the two laws, all of the authorities relied upon by the petitioner in its brief have no application to the instant case inasmuch as they are introduced by the petitioner to support its contention that since there is *no conflict*, identical federal and insular laws can exist side by side due to the police power of the insular legislature and the provisions of the Organic Act granting to the legislature "all local legislative powers".

POINT II.

The *Grafton* case has no application.

It is the petitioner's contention that since there is not necessarily any conflict between the Sherman Act and the local act, that in spite of federal legislation on the same subject, the local insular act is valid and that the local insular courts have concurrent jurisdiction with the United States District Court of Puerto Rico of the offenses in the local act, and if the insular courts first obtain jurisdiction over the offense and punishes the defendants, that the United States District Court for Puerto Rico cannot obtain jurisdiction and punish the defendants.

The petitioner claims that it is supported in this contention by *Grafton* v. *United States,* 206 U. S. 333, which petitioner contends sets up a different rule for the insular possessions and territories than that established by the *Railway Safety Appliance* cases which the petitioner admits hold that any State statute in a field occupied by Congress must be held inconsistent with the federal statute and must therefore give way and be considered unenforceable so long as the federal statute shall remain in force (Petitioner's Brief, p. 30).

Petitioner's argument would seem to be that the Insular Government of Puerto Rico, being an agency of Congress, all its enactments are federal laws. From this petitioner would seem to deduce that the Insular Government may enact laws in conflict with prior Congressional acts and vary or overrule the Congressional acts. This proposition will not hold water. While all insular acts are enacted by an agency of Congress, it has never been held that the agent (Legislature of Puerto Rico) may vary or overrule the

acts of the principal (Congress). Furthermore, the argument of petitioner would lead to the conclusion that an Insular territorial legislature in fact has greater power than a sovereign State.

The Circuit Court of Appeals in its opinion (R. 56, 57 and 58) considers this contention of the petitioner and points out that the *Grafton* case has no application to the present case and that the petitioner has completely misapprehended the facts in the *Grafton* case.

After considering the facts in the *Grafton* case (R. 56 and 57) the Circuit Court of Appeals said (R. 57 and 58):

> "This clearly shows that the question we have here was not and could not have been decided by the court in that case, for there the crime charged before the general court-martial was not a violation of a penal law of the United States but a violation of a local penal law as 'enforced by the civil power' and committed by 'an officer or soldier of the Army within the limits of the territory in which he is serving.' All that the Act of Congress (62d Article of War) operated to effect was the conferring of jurisdiction upon the general court-martial over the perpetration of a crime, less than capital, denounced by the public law of the Philippine Islands. There both the general court-martial and the courts of the Island had jurisdiction to try Grafton for the offense. Their jurisdiction was concurrent and the one that first acquired jurisdiction over the cause and the parties had authority to hear and determine the matter. This the general court-martial had done. Grafton could not be tried and sentenced a second time for the same act,—a violation of the same local penal code. In that case the Legislature of the Philippines alone had denounced the acts there complained of as a crime, not Congress; while here both the Congress

> and the Legislature of Puerto Rico have made the same act or acts a crime in Puerto Rico. This clearly shows why the question now before us was not and could not have been decided in the Grafton case, for the statute denouncing the act charged and attempted to be enforced in both courts was a statute of the Islands and there was no Act of Congress in force in the Philippines making that act a crime."

It is also interesting to note that this Court in the *Grafton* case held that the military authorities and the civil authorities had *concurrent* jurisdiction to try and punish the offender, while under the Judicial Code of the United States (*supra,* p. 8) the Federal District Court for Puerto Rico has *exclusive* jurisdiction to try and punish a defendant charged with a conspiracy in restraint of trade with which these defendants were charged.

POINT III.

The *Gutiérrez* case and the *Railroad Safety Appliance* cases and other cases decided by this Court have settled the law contrary to the petitioner's contentions.

The application of *El Paso & Northeastern Railway Co.* v. *Gutiérrez,* 215 U. S. 87, *Davis* v. *Beason,* 133 U. S. 333, and *Domenech* v. *National City Bank,* 294 U. S. 199, to the instant case was considered in the opinion of the Circuit Court of Appeals below (R. 53-56).

In regard to the *Gutiérrez* case it is the contention of the petitioner that the following part of the opinion of this Court in the *Gutiérrez* case (at p. 93) meant only that territorial legislation was superseded by the federal act in so

far as the federal act was necessarily in conflict with the territorial statute:

> "In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject."

The answer to this contention is that as stated previously under Point I of this brief, the Circuit Court of Appeals in its opinion below rested its decision upon this very point, *i. e.*, that the local insular Puerto Rico Act is necessarily in conflict with the Sherman Act in that it attempts to take away the exclusive jurisdiction of the United States District Court for Puerto Rico given it by the Sherman Act and to give it also to the insular courts.

Even if we agree with the petitioner's contentions that the above part of the *Gutiérrez* decision was limited to a conflict between the two acts, we find that the decision below in the instant case properly applied the *Gutiérrez* case to the facts in this record and was correct in stating that it controlled the instant case.

However, the respondents do not believe that this Court rested its decision in the *Gutiérrez* case on any such narrow ground, but that as stated by the Court below (R. 54):

> "The basis of this decision was that the power of Congress to legislate for the territories was plenary and, it having seen fit to enact the statute, the provisions of that law as to matters there dealt with were necessarily exclusive and the local legislature

under its authority as an agency of Congress to legislate for the territory, was without power to limit or defeat the act of Congress."

That this Court in the *Gutiérrez* decision *meant what it said* in the part quoted above, is clearly seen from the following parts of the same decision (at pp. 92, 93, 97).

"Coming to consider the merits: This court, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers,* 213 U. S., supra, held that in order to give due faith and credit to the territorial statute, under paragraph 906 of the Revised Statutes of the United States, the plaintiff suing in a State must show compliance with the preliminaries of notice and demand as required by the territorial law. As the answer in the present case set up non-compliance with these requisites, and the state court sustained a demurrer thereto, the judgment must be reversed unless the state court was right in denying the benefit of the territorial act thus set up, because the Federal Employers' Liability Act superseded the New Mexico law, and is constitutional so far as the Territories are concerned."

"When we consider the purpose of Congress to regulate the liability of employer to employe, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and *the Territories over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject* (Italics supplied).

The statement of this Court that Congress has plenary power over the territories which gives it "the undoubted right to pass a *controlling* law", and *to make uniform regulations governing the subject,* would seem to settle conclusively what was meant by this Court in the other part of its decision. The conflict between the two statutes, *could* have been the ground of the decision in the *Gutiérrez* case, but this Court chose to disregard that ground and to place its decision squarely on the ground that the legislation of the Congress necessarily superseded territorial law regulating the same subject matter.

The following statement in the decision of this Court in *Davis* v. *Beason,* 133 U. S. 333 at 348 was considered in the decision of the lower Court (R. 54, 55):

> "The cases in which the legislation of Congress will supersede the legislation of a * * * Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground"

and the lower Court in the instant case said about it:

> "Had the charge been based upon the specific matter covered by both the act of Congress and of the Territory, the rule above quoted would undoubtedly have been applied."

The decision of this Court in *Domenech* v. *National City Bank,* 294 U. S. 199 at 204 is also relied upon by the lower Court in the instant case (R. 55), where this Court held that the legislature of Puerto Rico cannot interfere with the powers over it granted to the Congress because Puerto Rico is an agency or dependency of the federal government, having no independent sovereignty.

Following this line of reasoning, the lower Court said (R. 58):

> "There being a single sovereignty whose laws are violated and for which there can lawfully be but one punishment, and the act of Congress being the supreme law, there can be but one conclusion and that is that the act of 1890 preempted the ground or superseded the local act relating to the same matter, and that the island district court was without jurisdiction of the offense."

The respondents believe that the following decisions of this Court have settled the question that:

(a) Congress is the paramount authority,

(b) As long as the Congress is silent, the States may legislate under their general powers and Puerto Rico may legislate under the grant of general legislative authority in its Organic Act,

(c) When the Congress exercises its paramount authority and undertakes to regulate the *subject*, the field is occupied and the inferior authority cannot regulate the subject matter, neither in conflict with nor in consonance with the Congressional regulation.

Southern Railway Co. v. *Railroad Commission of Indiana*, 236 U. S. 439, 446;
Texas & Pacific Ry. v. *Rigsby*, 241 U. S. 33, 41;
Spokane & Inland R. R. v. *Campbell*, 241 U. S. 497, 511;
Southern Railroad Co. v. *Reid and Beam*, 222 U. S. 444 at 447;
New York Central v. *Winfield*, 244 U. S. 147.

The decision of this Court in *Southern Ry. Co.* v. *R. R. Commission of Indiana,* 236 U. S. 439 is of particular application because the defendant in error therein raised most of the points raised by the petitioner herein concerning police power, need of conflict, similarity between two acts is not enough alone to invalidate the local law, that where certain acts are violations of both federal and State laws, both may punish, and that the State statute is supplementary to and in aid of the federal act (at pp. 441-443).

The facts in this case were that the Indiana statute required railroad companies to place secure grab-irons and handholds on the sides or ends of every railroad car, under a penalty of $100 fine to be recovered in a civil action. The Railroad Commission of Indiana brought such a suit against the railroad company alleging that a car did not have the required equipment. The defendant answered denying liability under the state law inasmuch as the Federal Safety Appliance Act imposed penalties for failing to equip cars with handholds *and also designated the court in which they might be recovered.* The Commission's demurrer to the answer was sustained, judgment entered against the railroad company which was affirmed by State Court and the case brought to this Court by writ of error.

This Court first pointed out that here there was no concurrent jurisdiction of federal and state acts nor was there an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other (p. 445). This Court said that the Congress had paramount jurisdiction to enact the Railroad Safety Appliance Act under the interstate commerce clause of the Constitution and that when exercised, it is exclusive and *ipso facto,* supersedes existing state legislation on the same subject. The State could not legislate thereafter so as to require greater or less or

different equipment, nor could then punish by imposing greater or less or different penalties. Also if the Congress has a constitutional power to regulate a particular subject, and it does so, the state legislatures cannot interfere by way of complement to the legislation of Congress to prescribe additional or auxiliary provisions for the same purpose.

The Court said (at p. 447):

> " * * * It is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument."

(At p. 448):

> *"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."* (Italics ours.)

In the decision of this Court in *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33 at 41, this Court said:

> "In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. *Southern Ry.* v. *R. R. Comm., Indiana*, 236 U. S. 439. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States

> to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failures to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other."

In the case of *Southern Railway Co.* v. *Reid and Beam*, 222 U. S. 444 this Court said at page 447:

> "We have shown . . . that there need not be directly inhibitive Congressional regulation, but Congressional legislation which *occupies the field of regulation*, and thereby *excludes action* by the State." (Italics ours.)

The same principles have been announced in relation to the Federal Employers Liability Act. *New York Central* v. *Winfield*, 244 U. S. 147. The argument in *contra* in this case was that Congress had not *fully* occupied the field because the Federal Act covered compensation only where negligence of the carrier was shown. But this Court rejected the argument and held that the Congressional Act must be held to have regulated the matter *inclusively and exclusively*, and that Congress having *occupied the field*, no room existed for state regulation even in respect to injuries occurring without fault, as to which the Federal Act provided no remedy.

POINT IV.

The territorial cases relied upon by the petitioner are clearly distinguishable from this case.

The only cases cited by the petitioner dealing with the Sherman Act and a territorial statute relating to anti-trust and restraint of trade violations are *Territory* v. *Long Bell Lumber Co.*, 22 Okla. 890, 99 Pac. 911 and *Wagner* v. *Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969.

We submit that these cases are clearly distinguishable upon their facts. *Neither of these cases was a criminal case.* The Oklahoma statute was not a copy of the Federal Act, but contained many provisions not found in the Federal Act. The Supreme Court of Oklahoma held that as to such matters not covered by the Federal Act the Oklahoma Statute was valid. Upon the facts before it this was all that the Oklahoma Court was called upon to decide. The *Long Bell* case was a proceeding against certain corporations under a nuisance law, the complaint proceeding upon the theory that those persons who habitually violated the Territorial Anti-Trust Act are perpetrating a public nuisance. The *Wagner* case was a suit upon a promissory note. The defendant pleaded as a defense a provision of the same Territorial Anti-Trust Act to the effect that the purchaser of an article from a seller transacting business contrary to the provisions of that statute should not be liable for the price of the article, and the Court upheld such defense.

In order to derive any benefit from these decisions the petitioner must necessarily rely upon the following dicta in the *Long Bell* opinion:

> "Nor is it any argument against the validity of this Act that a violator of it was liable to be prose-

> cuted twice for the same offense * * *. The rule in this respect is properly declared by the Supreme Court of Montana in the case of In Re Murphy, supra, as follows: 'The contention that the law of the territory was not valid, because the same act was punishable as a crime under the laws of the United States, and therefore, if they both were in force, the person committing the crime would be subject to punishment twice for the same offense, is not sound, as the Federal Government could punish it as a crime against it while at the same time it might be a crime punishable under the laws of the Territory. In this respect there is no distinction between a state and a territory in their respective relations to the general government.' "

This precise question, however, has been expressly decided contrary to the opinion thus expressed by the Oklahoma Court in *Grafton v. United States* (*supra*) where this Court held squarely that the same act could not constitute a crime against the United States and at the same time a separate crime against the Territory.

The Court said in the *Grafton* case:

> "The Government of the United States has no power, except as expressly or by necessary implication has been granted it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States, nor with a republican form of government, and which have not been surrendered by them to the general government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals. The same act, as held in Moore's case, may constitute two offenses, one against the United States and the other against a state. But these can not be predicated of the relations between the United

States and the Philippines. The Government of a state does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the State do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States."

POINT V.

The authorities relied upon by the petitioner which arose in territories that are now states are not applicable to Puerto Rico or to the facts in this case.

(a) The insular possession of Puerto Rico has an entirely different system of insular and federal courts than the territories which have now become States. The older territorial courts also had jurisdiction of offenses against the United States and applied thereto territorial rules of practice and procedure. Puerto Rico has a separate United States District Court for Puerto Rico, independent of the local insular courts with exclusive jurisdiction over federal offenses and applying federal criminal procedure and practice. (See p. 8, *supra.*)

The territorial courts of territories that are now States were vested with power to try all offenses within the territorial jurisdiction for violations of the laws of the ter-

ritory *and also for violations of the laws of the United States. In re Terrell,* 144 F. 616, *Johnson* v. *U. S.,* 6 Utah 403, 24 Pac. 256; *U. S.* v. *Mays,* 1 Idaho 763.

In criminal proceedings by the United States in the territorial courts of Oklahoma, those courts are required to conform to the practice and procedure prescribed by the territorial laws, and not that prescribed for the courts of the United States. *Cochran* v. *U. S.,* 147 F. 206; affirming 76 Pac. 672, 14 Okla. 108, *Welty* v. *U. S.,* 76 Pac. 121, 14 Okla. 7.

In *Welty* v. *U. S.,* 76 Pac. 121, 14 Okla. 7, the Court said that in a criminal case involving a crime against the United States, the federal practice and procedure prescribed for the District Courts of the United States did not apply to such a case in an Oklahoma territorial court because the territorial courts are not District Courts of the United States, but they are courts of the territories invested for some purposes with the powers of the courts of the United States.

To the same effect for the territory of Montana: *United States* v. *Ensign,* 2 Montana 396; *U. S.* v. *Bisel,* 8 Montana 20, 19 Pac. 251; *U. S.* v. *Flaherty,* 8 Montana 31, 19 Pac. 553.

The territorial courts of the territories are in a qualified sense, United States courts: *Chouteau* v. *Rice,* 1 Minn. 192; *United States* v. *Haskins,* Fed. Cas. #15322; *In re Osterhaus,* Fed. Cas. #10609.

(b) The question in the instant case as to whether the insular courts of Puerto Rico can by local law be given jurisdiction of an offense over which the United States District Court for Puerto Rico was given exclusive jurisdiction under the federal Sherman Act, did not arise in the territorial cases relied upon by the petitioner.

POINT VI.

The federal criminal code relating to adultery, bigamy, incest, etc. where the United States has exclusive jurisdiction has no application to the insular possessions of Puerto Rico and Hawaii.

The petitioner argues that the decision of the lower Court presents a special and important question of wide general interest for the reason that if the lower courts' decision is correct, it affects certain criminal offenses dealing with adultery, bigamy, incest, etc., in the penal codes of Puerto Rico and Hawaii which are alleged by the petitioner to be the same offenses punished by the federal criminal code set forth in 18 U. S. C. A., sections 511-523.

We have set forth above under Point I that the decision of that Circuit Court of Appeals below rested on the narrow point that in the opinion of that court the record disclosed an actual conflict between the federal and the insular statutes. Before the force of the lower Court's decision can apply to other insular criminal statutes, it must be established in such criminal cases in the insular courts as they arise, that there is actually a conflict between the federal criminal statute and the insular criminal law. The decision below decides nothing except that the particular statutes before the Court are in conflict.

An examination of these criminal laws on adultery, bigamy and incest shows that the federal law defines each of these offenses differently than the criminal codes of Puerto Rico and Hawaii, to the extent that a crime under the federal law may not be a crime under the insular law and *vice versa*. Compare 18 U. S. C. A. 512 with section 5725 of the Revised Statutes and Codes of Puerto Rico; 18

U. S. C. A. 513 with sections 5713-5716 of the Revised Statutes of Puerto Rico; 18 U. S. C. A. 516 with sections 5711 and 5712 of the Revised Statutes of Puerto Rico; 18 U. S. C. A. 517 with section 5717 of the Revised Statutes of Puerto Rico.

Section 511 of 28 U. S. C. A. reads as follows:

> "Places applicable. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District or within or upon any place within the exclusive jurisdiction of the United States" (March 4, 1909, c. 321, section 311, 35 Stat. 1148).

The language and history of this section shows that this chapter applies only to territories *within the exclusive jurisdiction of the United States.* Section 511 was introduced in 1909 as a new section, its purpose being to avoid repeating in each of the following sections of the chapter the places within which the several sections of the chapter should apply. (See Historical Note to 18 U. S. C. A. 511.) However, prior to 1909 this provision in each of the sections of the chapter read: "in a Territory or other place over which the United States have exclusive jurisdiction". (See Historical Note to 18 U. S. C. A. 513.)

Puerto Rico and Hawaii are under the sovereignty of the United States and are dependencies of the United States, but the United States does not have "exclusive jurisdiction" over these islands, in the sense meant in this chapter. Under the Organic Acts of Puerto Rico and Hawaii the Congress has established insular governments in these Islands (48 U. S. C. A. 492 and 731).

POINT VII.

The question raised by this petition and the record is not special nor important and there is no reason why it should be reviewed by this Court.

(a) A conflict between a Circuit Court of Appeals and decisions by territorial courts operating under a system different from Puerto Rico, is no reason for review by this Court. Rule 38 (5) of this Court confines its review to conflicts between two or more decisions of Circuit Courts of Appeal on the same matter. The territorial decisions relied upon by the petitioner to be in conflict with the decision of the lower Court, do not cover the "same matter" as the lower decision. None of them deal with a criminal information or indictment under a territorial anti-trust or restraint of trade statute. (See *supra,* Point IV.)

(b) There is no conflict between the decision of the Circuit Court of Appeals and the territorial cases relied upon by the petitioner. (See *supra,* Points IV, V and VI.)

(c) The question raised has been settled by this Court in the *Gutiérrez* case, the *Railroad Safety Appliance* cases, the *Beason* case, the *Domenech* case and the *Winfield* case. (See *supra,* Point III.)

(d) The decision of the Circuit Court of Appeals below that there was an actual conflict, is not a reason for review by this Court. (See *supra,* Point I.)

(e) The contention of the petitioner that the question is of wide general interest because the lower decision will apply to other criminal laws of the territories, is without merit. (See *supra,* Point VI.)

Conclusion.

The petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, should be denied.

Respectfully submitted,

JAMES R. BEVERLEY,
Attorney for Respondents.

RYDER PATTEN,
of Counsel.

San Juan, Puerto Rico, April 23, 1937.

RESPONDENTS' BRIEF

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Supreme Court of the United States

October Term 1937

No. 18

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

THE SHELL CO. (P. R.) LIMITED *et al.*,
Respondents.

BRIEF FOR RESPONDENTS, THE TEXAS CO. (P. R.), INC., WEST INDIA OIL CO., ROBERT B. BUSHBY, BENJAMIN ARKIN, R. H. DOWNING, ENRIQUE HERNANDEZ ACOSTA, CHARLES H. LEE, ANTONIO MAGRIÑA, ANDRES LOPEZ DE HARO AND JOSE NOYA.

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BYDEE PATTEN,
Of Counsel.

SUBJECT INDEX.

	PAGES
Brief Statement of the Case	1–2
Opinions Below	2
Question Presented	2–3
Statutes Involved	3–6
Summary of the Argument	6
Argument	7–22
POINT I—Congress has plenary power to legislate for Puerto Rico as well on internal matters as on subjects having a broader field	7
POINT II—The Sherman Act of 1890, 26 Stat. 209 and the Clayton Act, 38 Stat. 730, are in force in Puerto Rico	8–11
POINT III—Congress has occupied the field of anti-trust legislation as regards Puerto Rico	11–13
POINT IV—When Congress has occupied a field of legislation within its power to occupy, its regulation of the subject matter is inclusive and exclusive, and state or territorial statutes on the same subject matter are necessarily superseded	13–21
a. The only sovereignty in Puerto Rico is that of the United States, and an act cannot constitute at the same time distinct offenses against the United States and against the Territory of Puerto Rico	14–16
b. Analogy to interstate commerce cases where State may act until Congress occupies the field	16–20
c. The Territorial cases on which Petitioner relies	20–21
d. Possible effects of this case on other statutes	21
Conclusion	22
APPENDIX—Opinion of Puerto Rico Supreme Court in *United Theatres* case (Translation)	23–33

Table of Cases.

	PAGES
American R. R. Co. v. Birch, 224 U. S. 547	10
American R. R. Co. v. Didricksen, 227 U. S. 145	10
Asiatic Petroleum Co. v. Insular Collector, 297 U. S. 666	7
Balzac v. Puerto Rico, 258 U. S. 298	7
Davis v. Beason, 133 U. S. 333	16, 21
Domenech v. National City Bank, 294 U. S. 199	10, 21
El Paso & N. E. Ry. v. Gutiérrez, 215 U. S. 87	15
Farmers Bank v. Minnesota, 232 U. S. 516	7, 14
Grafton v. United States, 206 U. S. 333	14
Insular Cases, 182 U. S. 1-398	7
International Shoe Co. v. Pinkus, 278 U. S. 261	19
Kopel v. Bingham, 211 U. S. 468	10
Lindgren v. United States, 281 U. S. 38	19
Meléndez v. United States, 15 F. (2d) 770	10
Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412	19
Missouri Pacific R. R. Co. v. Porter, 273 U. S. 341	19
Murphy, In re, 5 Wyo. 297, 40 Pac. 398	20
National Bank v. Yankton County, 101 U. S. 129	7
New York Central v. Winfield, 244 U. S. 147	17
Northern Pacific Ry. v. Washington, 222 U. S. 370	20
Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87	19
Peck S. S. Co. v. N. Y. & P. R. S. S. Co., 2 P. R. Fed. 109	10
Pennsylvania R. R. Co. v. Public Service Com., 250 U. S. 566	18
Port Richmond Ferry v. Hudson County, 234 U. S. 317	20
Rafferty v. Smith Bell & Co., 257 U. S. 226	14
Ribas e Hijos v. United States, 194 U. S. 315	11

PAGES

Snow v. United States, 18 Wall. 317 7
Southern R. R. Co. v. Reid, 222 U. S. 424 ..... 17, 20
Southern R. R. Co. v. Reid & Beam, 222 U. S. 444 17
Southern R. R. Co. v. R. R. Commission of Indiana, 236 U. S. 439 16
Spokane & Inland R. R. v. Campbell, 241 U. S. 497 16
State v. Norman, 16 Utah 457, 52 Pac. 986 20

Territory v. Alexander, 11 Ariz. 172, 89 Pac. 514 20
Territory v. Guyott, 9 Mont. 46, 22 Pac. 134 20
Territory v. Long Bell Lumber Co., 22 Okla, 890, 99 Pac. 911 20
Texas & Pacific Ry. v. Rigsby, 241 U. S. 33 16

United Theaters, Inc. v. District Court, 47 D. P. R. 725 ..... 18, 20
United States v. Heinszen & Co., 206 U. S. 370 14

Statutes.

Constitution of the United States, Art. IV, Section 3, Clause 2 7

United States:
Clayton Act of 1914 ..... 2, 8
Judicial Code, Section 24 5
Organic Law of Puerto Rico of 1900 (Foraker Act), Section 14 8
Organic Law of Puerto Rico of 1917 (Jones Act),
Section 9 ..... 5, 8
Section 41 6
Robinson-Patman Act of 1936 11
Sherman Act of 1890 ..... 2, 4, 8, 11

Puerto Rico Anti-Trust Act of 1907 ..... 2, 3, 11

Opinions: Attorney General of the United States:
23 Op. 169 (National Banking Act) 11
23 Op. 400 (Seamen's Relief) 11
23 Op. 634 (Trademarks) 10
24 Op. 86 (Immigration Act) 11
36 Op. 329 (Agricultural Marketing Act) 10
37 Op. 549 (National Recovery Act) 11

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Short Statement of the Case.

This is a certiorari to review a decision of the United States Circuit Court of Appeals for the First Circuit affirming a judgment of the Supreme Court of Puerto Rico which in turn had upheld the decision of the District Court of San Juan, Puerto Rico, dismissing for lack of jurisdiction a complaint against the respondents.

On July 13, 1934, the District Attorney for the Judicial District of San Juan, Puerto Rico, filed an amended information against respondents (R. 1-4), charging that in connection with the sale and distribution of gasoline and other petroleum products in San Juan, respondents had conspired to restrain competition and to fix uniform and arbitrary prices, and to coerce retailers to sell at the prices so fixed

in violation of the Act of the Legislature of Puerto Rico approved March 14, 1907 entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies". The prosecution was under Section 1 of the Act.

The defendants demurred to the information on the ground among others, that the Insular Courts were without jurisdiction in the matter because the Act of March 14, 1907, on which the prosecution was based, was null and void and without effect; that the Congress of the United States had preempted and occupied the field of such legislation in Puerto Rico by the Sherman Act of July 2, 1890 (15 U. S. Code Ann. 3, 4) and by the Clayton Act of October 15, 1914 (15 U. S. Code Ann. 12-27) (R. 6-27). The demurrers were sustained on the grounds just mentioned, the District Court holding that cognizance of the offense charged was within the exclusive jurisdiction of the United States District Court for the District of Puerto Rico (R. 27).

Opinions Below.

The opinion of the District Court for the Judicial District of San Juan, Puerto Rico, is not officially reported. It is printed in the record at page 27. The opinion of the Supreme Court of Puerto Rico of December 20, 1935, is found in 49 D. P. R. 226 (Spanish Edition). The English volume has not yet been printed. The opinion is found in the Record, pages 36-45. The opinion of the United States Circuit Court of Appeals is reported in 86 Federal (2nd) 577.

Question Presented.

The only question before this Court is whether the local anti-trust statute of Puerto Rico is in force in the Island

in view of the fact that Congress has enacted the Sherman Act and the Clayton Act covering the same field and which were conceded by petitioner in the Court below and apparently in its petition for certiorari to be in force in Puerto Rico.

Statutes.

The following statutes are material to a determination of this case:

The Act of the Legislative Assembly of Puerto Rico, approved March 14, 1907 (Laws 1907, p. 328; 1911 revision, paragraph 2372) provides as follows in part:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.
>
> "Section 2. Every person who shall monopolize or attempt to monopolize or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Porto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars, or by imprisonment, not exceeding one year, or by both such punishments, in the discretion of the Court.

"Section 3. *The district courts of the island are hereby vested with jurisdiction* to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. * * *"

* * * * * * *

"Section 5. *Any person who shall be injured* in his business or property by any other person, corporation, company or association, by reason of anything forbidden or declared to be unlawful by this Law, *may sue therefor in the court for the district in which the defendant resides, or in the court for the district in which the plaintiff resides,* and shall recover the damage by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics supplied).

The Sherman Act (15 U. S. C. A. 3, *et seq.;* 26 Stat. 209) provides as follows:

"3.—Trusts in Territories or District of Columbia illegal; combination a misdemeanor. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce *in any Territory of the United States* or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine

not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court (July 2, 1890 c. 647, sec. 3, 26 Stat. 209).

"4.—Jurisdiction of courts; duty of district attorneys; procedure. *The several district courts of the United States are invested with jurisdiction* to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." (Italics supplied.)

Section 24 of the Judicial Code (28 U. S. C. A. 41) provides:

"Sec. 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:

"(2) Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States."

Section 9 of the Organic Law of Puerto Rico (39 Stat. 954, 48 U. S. C. A. 734) provides:

"Section 9.—That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws; Provided, however, That hereafter all taxes collected under the internal revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the Island shall be covered into the Treasury of Porto Rico."

Section 41 of the Organic Law of Puerto Rico (Act of March 2, 1917, 39 Stat. 965; 48 U. S. C. A. 863) provides in part:

> "Sec. 41. That Porto Rico shall constitute a judicial district to be called 'the District of Porto Rico' • • •. The District Court for said district shall be called 'The District Court of the United States for Porto Rico' • • •. Such district court shall have jurisdiction over all cases cognizable in the district courts of the United States, and shall proceed in the same manner. • • •"

Summary of the Argument.

1. Puerto Rico being a Territory or Insular Possession of the United States, Congress has plenary authority to legislate for the Island on anti-trust matters.

2. Congress has legislated for Puerto Rico through the Sherman Act and the Clayton Act.

3. Congress has occupied the field of anti-trust legislation as regards Puerto Rico.

4. When the superior power or principal (Congress) has occupied a field within its powers to occupy, there is no room for the inferior power or agent (Legislature of Puerto Rico) to act; and the Act of Congress supersedes the local act and makes it non-operative. Hence the local Anti-Trust Act of Puerto Rico is superseded and is without effect.

ARGUMENT.

POINT I.

Congress has plenary power to legislate for Puerto Rico as well on internal matters as on subjects having a broader field.

This proposition is so well settled that little argument is necessary. The Constitution of the United States, Article IV, Section 3, Clause 2, provides:

> "The Congress shall have Power to dispose of and to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Puerto Rico is territory of the United States by virtue of the Treaty with Spain ratified April 11, 1899. *The Insular Cases,* 182 U. S. 1-398; *Balzac* v. *Puerto Rico,* 258 U. S. 298. The power of Congress over Territories, organized or unorganized, incorporated or not incorporated, has always been held to be plenary. "The territories are but political sub-divisions of the outlying dominion of the United States." *National Bank* v. *County of Yankton,* 101 U. S. 129, 133; *Snow* v. *United States,* 18 Wall. 317, 321; *Farmers etc. Bank* v. *Minnesota,* 232 U. S. 516; *Asiatic Petroleum Co.* v. *Insular Collector,* 297 U. S. 666, 671.

POINT II.

The Sherman Act of 1890, 26 Stat. 209, and the Clayton Act, 38 Stat. 730, are in force in Puerto Rico.

The petitioner conceded in the Court below that these Congressional acts extend to and are operative in Puerto Rico, and this question was not presented in the petition for certiorari. However, it is noted that petitioner's brief in this Court (pp. 14-26) argues that the Sherman Act is not extensive to Puerto Rico.

Section 9 of the Organic Act of Puerto Rico of 1917, known as the Jones Act (39 Stat. 954; 48 U. S. C. A. 734) provides in its pertinent part:

> "Section 9.—That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws . . . ."

So far as this argument is concerned this is an exact repetition of the first part of Section 14 of the prior Organic Act of 1900 (Foraker Act, 31 Stat. 80). In the case of *United Theatres et al.* v. *District Court of San Juan,* 47 D. P. R. 725 (Spanish Edition), the English translation of which is printed as Appendix I to this brief, the Supreme Court of Puerto Rico pointed out that this provision by Congress does away with any importance that otherwise might be attached to the fact that Puerto Rico is an "unincorporated" territory though fully organized. In view of the explicit language of Congress in Section 9 copied above, it is difficult to see any reason why the Sherman Act should be held not to extend to Puerto Rico.

It can hardly be said to be "locally inapplicable". The words "not locally inapplicable" may mean that the occasion may arise when some general statute of the United States cannot be applied to Puerto Rico because of a different system of jurisprudence, different customs and traditions or because of the fact that Puerto Rico is not contiguous to the continental United States. However, none of these objections apply to the Sherman Anti-Trust Act which would be a salutary statute for the Island in spite of any special circumstances that may set Puerto Rico apart from the continental United States for other purposes. The best argument that the legislation against restraints of trade and commerce is desirable for Puerto Rico is the passage of the local law and the Clayton Act in 1914 supplementing and expanding the Sherman Act.

The words "not locally inapplicable" also may have another significance, namely, on the administrative or operative side of the statute. Can the Sherman Anti-Trust Act be administered and enforced in Puerto Rico and can violations thereunder be punished, and does the United States have the proper Federal machinery and officials in the Island to administer the law and to prosecute violations? This question can be answered by referring to Section 4 of the Sherman Anti-Trust Act which provides that violations of Section 3 of the Sherman Anti-Trust Act shall be prosecuted in the several district courts of the United States and that it shall be the duty of the several District Attorneys of the United States to institute proceedings in equity to prevent and restrain such violations; and can be further answered by reference to the provisions of the Organic Act of Puerto Rico setting up in Puerto Rico the United States District Court for Puerto Rico, and also giving the said Court jurisdiction of all cases cognizable in the District Courts of the United States (48 U. S. C. A. 863).

There are also provisions in other statutes of the United States for the office and salary of the United States Attorney for the Island of Puerto Rico. The judicial and prosecuting machinery of the United States is on hand in Puerto Rico in the same way that it exists in the States to prosecute any violation of the Sherman Anti-Trust Act that may occur in Puerto Rico. This is pointed out in *Peck Steamship Line* v. *New York and Puerto Rico Steamship Co.* (1906), 2 Puerto Rico Federal Reports 109, at page 131, holding the Sherman Act applicable to the Island, where the Court said that Puerto Rico is in fact more of an organized territory than some of the other jurisdictions because it has a separate United States District Court presumably to enforce United States laws as a part of its jurisdiction, wholly distinct and separate from the local insular courts which form a complete and ample local system in themselves.

Various federal acts have been held applicable to Puerto Rico from time to time regardless of lack of mention of insular possessions in the acts themselves. *Domenech* v. *National City Bank,* 294 U. S. 199 (National Banking Act); *Meléndez* v. *United States,* 15 F. (2) 770 (Section 332 of Criminal Code of the United States, regarding the aiding, abetting, etc., of a crime); *People ex rel. Kopel* v. *Bingham,* 211 U. S. 468 (Interstate extradition); *American Railroad Co.* v. *Didricksen,* 227 U. S. 145 (Safety Appliance Act); *American Railroad Co.* v. *Birch,* 224 U. S. 547 (Employers' Liability Act of 1908); Agricultural Marketing Act of 1929, 36 Op. A. G. U. S. 326, 329; *Peck Steamship Line* v. *New York & Puerto Rico Steamship Co.,* 2 P. R. Fed. 109 (1906), in which the U. S. District Court for Puerto Rico held the Sherman Act applicable to Puerto Rico; Trademark Act, 23 Op. A. G. U. S. 634; Statute relating to seamen's relief

by consuls, 23 Op. A. G. U. S. 400; Immigration Act of 1882, 24 Op. A. G. U. S. 86; *J. Ribas e Hijo* v. *United States*, 194 U. S. 315 (Tucker Act); National Banking Act, 23 Op. A. G. U. S. 169; National Industrial Recovery Act, 37 Op. A. G. U. S. 549.

POINT III.

Congress has occupied the field of anti-trust legislation as regards Puerto Rico.

The reasons why these respondents believe the Sherman Act is extensive to Puerto Rico are given under Point II of the argument. The Clayton Act is clearly extensive to Puerto Rico by its own explicit terms. It is also submitted that the Robinson-Patman Act of 1936 (49 Stat. 1526 ff.) is clearly applicable to Puerto Rico and that these three acts form a complete body of anti-trust legislation covering the entire field.

That the field has been occupied by Congress is shown by the language of Sections 3 and 4 of the Sherman Act and the comparison of these sections with the first and third sections of the Puerto Rican Act under which the information here involved was brought.

The Sherman Act.	*Puerto Rican Act.*
Section 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce	Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of

The Sherman Act.	*Puerto Rican Act.*
between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.	Porto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.
Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.	Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin and restrain such violations.

The offenses denounced are the same; the punishments are the same, but the Sherman Act vests in the district courts of the United States jurisdiction over violations of the Act, while the Puerto Rican Act vests jurisdiction in the insular courts. Petitioner argues that the two acts are not in conflict. Whether the two acts are in conflict or not depends to some extent on definition. If by "conflict" is meant that one statute permits what the other prohibits, they are not in conflict. But they are certainly in conflict in two ways: they direct that violations of the acts denounced shall be tried in different courts, and they both try to occupy the same field at the same time. In those two senses the acts are in direct conflict, though the evils sought to be reached by both acts are identical. Certainly the above comparison shows that Congress had occupied the field, and in the Clayton Act and Robinson-Patman Act Congress went far beyond the Puerto Rican Act of 1907.

POINT IV.

When Congress has occupied a field of legislation within its power to occupy, its regulation of the subject matter is inclusive and exclusive, and state or territorial statutes on the same subject matter are necessarily superseded.

The main contention of petitioner is to the effect that both the Insular and the Congressional statutes covering the same subject matter can stand so long as there is no direct conflict between them; and by "conflict" petitioner evidently must mean conflict in the sense that one act prohibits what the other act permits; that one act says "Go" where the other says "Stop".

But petitioner overlooks the fact that Puerto Rico is not an independent sovereignty in the sense that a State is sovereign. There is only one sovereignty in Puerto Rico, that of the United States. *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 524; *Grafton* v. *United States,* 206 U. S. 333. Petitioner attempts to draw an analogy between a State's powers and the powers of the Territory of Puerto Rico. But such an analogy cannot stand the slightest examination in so far as inherent powers or sovereignty is concerned. The states do not derive their powers or existence from the United States; Puerto Rico's government owes all its powers and its very existence to the national government. The government of Puerto Rico is merely an agency of Congress for the governing of the Island. *United States* v. *Heinszen & Co.,* 206 U. S. 370. *Rafferty* v. *Smith Bell & Co.,* 257 U. S. 226.

Petitioner also appeals to the rule of statutory construction that repeals by implication are not favored. But there is no such question involved in this case. This is not a case of a repeal by implication. It is a case where a paramount power and a subordinate power have both tried to cover the field of anti-trust legislation in Puerto Rico. Which shall prevail? Manifestly the legislation of the superior authority. To argue that both may remain is to establish a state of confusion and uncertainty in which the federal authorities may oust the insular courts of jurisdiction by prosecuting first in any particular case or *vice versa* the insular authorities may oust the federal court of jurisdiction by proceeding first. Such sort of concurrent jurisdiction over an identical offense against two laws where there exists only one sovereignty would have to be conferred by plain federal statutory language. The language of the

Sherman Act, Section 4, will not support such an interpretation. Heretofore when concurrent jurisdiction has been deemed advisable, it has been conferred by direct act of Congress, *e. g.*, violations of the National Prohibition Act where concurrent jurisdiction was conferred in the act of September 21, 1922, entitled "An Act to confer upon the territorial courts of Porto Rico concurrent jurisdiction with the United States courts of that district of all offenses under the National Prohibition Act and all acts amendatory thereof or supplemental thereto" (Public No. 327, 67th Congress, H. R. 9270; 48 U. S. C. A. 862).

On the contrary it has been held by a long line of cases and is too well settled to be now disputed that when Congress enters a field within its power to enter, its regulation is co-terminous with its power and the state or territorial statutes on the same subject matter must give way.

In the case of *El Paso and N. E. Ry.* v. *Gutiérrez*, 215 U. S. 87, there was involved the question as to whether a part of the territorial statute of New Mexico regulating the procedure in actions for injuries resulting in death could be set up as a defense in a suit under the Federal Employers' Liability Act of 1906 (34 Stat. 232). This Court held that the federal act was applicable to common carriers in the Territories and the District of Columbia and said in connection with the local act covering the *same subject:*

> "In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States *would necessarily supersede the territorial law regulating the same subject.*" (Italics ours.)

Respondents believe that this states the general rule always adhered to in this Court. *Cf. Davis* v. *Beason,* 133 U. S. 333, at page 348.

It is also believed that there is a good analogy to the present case in the power of Congress over commerce between the States. There is a field, as shown by cases decided in this Court, where the authority of Congress is paramount *if exercised,* but where a State may act under its general powers *until Congress takes possession of the field.* We think the situation in the present case is analogous to this class of cases. Puerto Rico undoubtedly had the power under its general legislative power *granted by Congress,* to enact an anti-trust statute for the Island unless Congress, the paramount authority, had already done so (or if the Congressional Act is the later of the two, until Congress acted).

Congress has enacted anti-trust legislation applicable to Puerto Rico. Can the Insular legislature occupy the same field and determine that the prohibited acts shall be punishable in the Insular courts and according to Insular procedure instead of in the Federal Court of the Island and according to Federal procedure? We think not.

When Congress enacted the Safety Appliances Act for common carriers, similar state statutes to the same effect were *superseded* as to those carriers to which the Congressional act could apply.

Southern Railroad Co. v. *Railroad Commission of Indiana,* 236 U. S. 439, 446.

Spokane & Inland R. R. v. *Campbell,* 241 U. S. 497, 511.

Texas & Pacific Ry. v. *Rigsby,* 241 U. S. 33, 41, where it said (italics supplied):

> "Congress having *entered* the *field of regulation* * * * state regulation of the *subject matter* is excluded."

In *Southern Railroad Co.* v. *Reid and Beam*, 222 U. S. 444, the state courts of North Carolina had upheld a state statute penalizing delay in forwarding freight, on the ground in part that the state statute was not in conflict with the Interstate Commerce Act. This Court said (p. 447):

> "We have shown * * * that there need not be directly inhibitive Congressional regulation, but Congressional legislation which *occupies the field of regulation*, and thereby *excludes action* by the State." (Italics ours.)
>
> "Manifestly one authority must be paramount and when it speaks the other must be silent. We see no middle ground." *Southern Railway Co.* v. *Reid*, 222 U. S. 424 at p. 440.

The same principles have been announced in relation to the Federal Employers' Liability Act. *New York Central* v. *Winfield*, 244 U. S. 147. The argument in *contra* in this case was that Congress had not *fully* occupied the field because the Federal Act covered compensation only where negligence of the carrier was shown. But this Court rejected the argument and held that the Congressional Act must be held to have regulated the matter *inclusively and exclusively*, and that Congress having *occupied the field*, no room existed for state regulation even in respect to injuries occurring without fault, as to which the Federal Act provided no remedy.

We believe the analogy of these cases (and of the many others to the same effect) to the Puerto Rican situation is sound.

a. Congress is admittedly the paramount authority in each case.

b. As long as Congress is silent, the States may legislate under their general powers and Puerto Rico may legislate under the grant of general legislative authority in its Organic Act.

c. When Congress exercises its paramount authority and undertakes to regulate the subject, the field is occupied and the inferior authority cannot regulate the subject matter, neither in conflict with nor in consonance with the Congressional regulation.

Following the analogy above, a great many cases from this Court speak to the same effect. In *Pennsylvania Railroad Co.* v. *Public Service Commission*, 250 U. S. 566 at p. 568, it is said in connection with a Pennsylvania law regulating the construction of the last car on trains:

> "We pass to the merits of the case. If all that had been done on behalf of the United States in the way of regulation had been to determine how mail cars should be built, and to exclude a thirty-inch platform, it might be said that the state law could be obeyed by putting a different car at the end of the train. It would be a tax upon the railroad when the company wished to run a mail train wholly made up of mail cars, but it could be done and it is not necessary to say that the State could not require it. But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, *the States no more can supplement its requirements than they can annul them.*" Citing *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 446. *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture* Co., 237 U. S. 147. (Italics supplied.)

See also *Missouri Pacific R. R. Co.* v. *Porter et al.*, 273 U. S. 341 relating to bills of lading:

> "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and as that power has been exerted, state laws have no application. *They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.*" Citing *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 102; *Penna. R. R. Co.* v. *Public Service Comm.*, 250 U. S. 566; *Charleston & Car. R. R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 505; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370, 378; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, 618; *Houston* v. *Moore*, 5 Wheat. 1, 21, 22. (Italics supplied.)

Compare also *Lindgren* v. *United States*, 281 U. S. 38 (Merchant Marine Act); *Oregon-Washington Railroad & Navigation Co.* v. *Washington*, 270 U. S. 87 (State quarantine law); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (bankruptcies); *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, at 417 where it is said:

> "It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject are superseded. *Northern Pacific Ry.* v. *Washington*, 222 U. S. 370, 378; *Erie Railroad Co.* v. *New York*, decided May 25, 1914, 233 U. S. 671."

Port Richmond Ferry v. *Hudson County,* 234 U. S. 317, 330 (ferriage); *Northern Pacific Railway* v. *Washington,* 222 U. S. 370. (Hours of Service Law.) From the headnotes of this case the following is taken:

> "Congress by enacting a statute in regard to a subject within its exclusive power manifests its purpose to call that power into effect, and at once *removes that subject* from the sphere of state action and even if Congress provides that the statute shall not go into effect until a subsequent date the *States lose control of that subject* during the intermediate period from the enactment to the active operation of the statute." (Italics supplied.)

It is unnecessary to labor this point longer. It is submitted that the principle announced in all of these cases decides this present case, and Congress having occupied the field of anti-trust legislation in Puerto Rico, the local statute on the identical subject matter is superseded. "We see no middle ground." *Southern Railway Co.* v. *Reid, supra.*

The Oklahoma case and other Territorial cases.

On the principal point, petitioner relies almost entirely on four cases decided by the territorial courts of Oklahoma, Utah, Wyoming and Montana. *Territory* v. *Long-Bell Lumber Co.,* 22 Oklahoma 890, 99 Pac. 911; *State* v. *Norman,* 16 Utah 457, 52 Pac. 986; *Territory* v. *Guyott,* 9 Mont. 46, 22 Pac. 134; *In re Murphy,* 5 Wyo. 297, 40 Pac. 398.

The Supreme Court of the Territory of Arizona held to the contrary in *Territory* v. *Alexander,* 11 Ariz. 172, 89 Pac. 514, and in consonance with the decisions of the Supreme Court of Puerto Rico in the instant case and in the *United Theatres* case (Appendix I).

In the first place, these cases are in no sense authority for this Court. Further an examination of the *Norman* case, the *Murphy* case and the *Long-Bell Lumber Co.* case shows that the respective territorial courts conceived a Territory as having an independent sovereignty as does a State, a sovereignty independent of the sovereignty of the United States. But this is clearly not so. *Domenech* v. *National City Bank,* 294 U. S. 199. And these cases must be disregarded as clearly contrary to the many later opinions of this Court.

Possible effects on other laws.

Petitioner lays considerable stress on the possible effect of the decision in this case on the Federal statutes applicable to territories relating to circulation of obscene literature, adultery, polygamy and bigamy. These respondents take the position that argument on these collateral matters is immaterial to this case. Each case will of course depend on its own facts and situation. Cf. *Davis* v. *Beason, supra.* The general principle is not altered by possible future cases under other and distinct laws. If the principle is invoked in future cases in connection with statutes relating for example to polygamy, etc. and upon examination it is found that the principle is applicable, it must be applied. Any remedy to correct a situation which petitioner seems to infer would be undesirable must be sought at the hands of the Congress.

Conclusion.

The unanimous decision of the Supreme Court of Puerto Rico and that of the United States Circuit Court of Appeals affirming the same in this case are clearly right and should be affirmed.

Respectfully submitted,

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Of Counsel.

APPENDIX I.

IN THE

SUPREME COURT OF PUERTO RICO

THE UNITED THEATRES INC., RAFAEL RAMOS COBIÁN, *et al.*, *Petitioners,* v. THE DISTRICT COURT OF SAN JUAN, *Respondent.*	No. 986. Certiorari.

Opinion of the Court delivered by Mr. Justice HUTCHINSON. San Juan, Puerto Rico, December 10, 1934.

The People of Puerto Rico brought a suit for injunctive and other relief under an act of the Insular Legislature entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved March 14, 1907 (session laws 328). A district court issued a temporary restraining order, and an order to show cause why it should not be continued in force. In response to the order to show cause defendants challenged the jurisdiction of the court and moved to set aside the restraining order. This the court refused to do upon the authority of Dávila v. The District Court of Mayagüez, 43 P. R. R. 554.

In the Dávila case, this court, referring to its previous decision in People v. Galanes, 15 P. R. R. 365, said:

> "At the time of that decision this court had some idea Porto Rico, although not an incorporated territory was to be regarded as a territory of the United

States, to which general statutes might be applicable. After the decisions of the Supreme Court of the United States in People v. Muratti, 245 U. S. 639, and Balzac v. Porto Rico, 258 U. S. 298, we think that it is settled law that Porto Rico, although organized, is not an incorporated territory.

"In each of the organic acts the following appears:

" 'That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter other wise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws * * * ' Section 14 of the Foraker Act; Section 9 of the Jones Act.

"Under the foregoing decisions of the United States Supreme Court a general law of the United States applicable to 'territories' would not include an unincorporated territory like Porto Rico unless Congress indicated such an intention. González v. People of Porto Rico, 51 Fed. (2d) 61, also seems to be applicable.

"We agree with the court below that the Sherman Act is not applicable to Porto Rico by its terms. We find nothing in its provisions to show that Congress intended to cover a crime committed in Porto Rico."

The Sherman Act, supplemented as it was in 1914 by the Clayton Act, covers the entire ground of the local law. The question is as to whether or not it is "locally inapplicable". After further consideration, we are unable to adhere to the conclusion reached in Dávila v. The District Court.

It is "settled law that Porto Rico, although organized is not an incorporated territory". It does not follow that "the statutory laws of the United States" must be regarded

as "locally inapplicable" in the absence of a contrary intention indicated by Congress at the time of the passage of the law in question.

In Balzac v. People of Porto Rico, 258 U. S. 298, the question was "whether that part of the Sixth Amendment to the Constitution, which requires that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, applies to Porto Rico". This and other Constitutional provisions for jury trial had been held to apply either *ex proprio vigore* or as the result of Congressional action to criminal prosecutions in the "territories of the United States" but not to operate as a limitation upon the powers of Congress in legislating for unincorporated territory. More than fifteen years before the date of the decision in Balzac v. People of Porto Rico, and more than a decade before the passage of the Jones Act, the Supreme Court, in Rassmussen v. United States, 197 U. S. 516, 519, had said:

> "At the bar the Government did not deny that offenses of the character of the one here prosecuted could only be tried by a common law jury, if the Sixth Amendment governed. The Government, moreover, did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is therefore sought to be sustained upon the proposition that the Sixth Amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions which we proceed separately to consider.

"1. *Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska.*

"If the premise, that is, the status of Alaska, be conceded, the conclusion deduced from it is established by the previous rulings of this court. In Dorr v. United States, 195 U. S. 138, the question was whether the Sixth Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in Downes v. Bidwell, 182 U. S. 244, to think that the uniformity clause of the Constitution was inapplicable to Porto Rico, and following the ruling announced in Hawaii v. Mankichi, 190 U. S. 197, it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those Islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation. The power to acquire territory without incorporating it into the United States as an integral part thereof, as we have said, was sustained upon the reasoning expounded in the opinion of three, if not of four, of the judges who concurred in the judgment in Downes vs. Bidwell, that reasoning being in effect adopted in the Dorr case as the basis of the ruling there made, the court saying (p. 143):

" 'Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (Downes v. Bidwell) that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restric-

tions upon the powers of that body as are applicable to the situation.'

"And in view of the status of the Philippine Islands it was decided that the Sixth Amendment was not applicable to those Islands, and therefore Congress, when it legislated concerning them, was not controlled by the provisions of that Amendment. It would serve no useful purpose to reexpress the reasons supporting this conclusion, and we content ourselves with quoting the summing up made by the Court in the opinion in the Dorr case, as follows (p. 149):

" 'We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, Section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.' "

In the Rassmussen case the controversy was at an end when it was shown that Alaska was an incorporated territory and, that the provisions of the Constitution were therefore operative. In the Balzac case when it was shown that Congress in 1917 had not converted Puerto Rico, already a completely organized territory, into an incorporated territory, the controversy was likewise at an end. In the case at bar, the result depends on other considerations.

If it be true that Congress in the Sherman Act did not indicate that the words "any territory of the United States"

were intended to include unincorporated territory, that omission is a matter of minor importance. Nevertheless, we may note in passing that the Sherman Law was enacted in 1890, some ten years before the question as to the status of unincorporated territory became acute. The words "any territory of the United States" would naturally include any such territory subsequently acquired and organized. Taking into consideration the fact that, as pointed out in the Balzac case "the distinction between acquisition and incorporation was not regarded as important, or at least * * * was not fully understood", it is perhaps a fair inference that Congress intended to include all territory subsequently acquired and organized. Certainly there is no more evidence of an intention to exclude unincorporated territory subsequently acquired and organized than there is of an intention to include such territory in the expression "any territory of the United States." For the purpose of this opinion it may be conceded without holding that Congress in 1890 did not intend to include in the phrase "any territory of the United States" unincorporated territory subsequently acquired. The question now is whether the Sherman Act is locally inapplicable within the meaning of that phrase as used in our two Organic Acts. With some reluctance we have come to the conclusion that it is "not locally inapplicable".

Congress, in 1900, as well as in 1917, was aware of the fact that Puerto Rico was not an incorporated territory. In the Foraker Act, as in the Jones Act, it was "sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it." Balzac v. Porto Rico, *supra*, at page 311. Nevertheless, Congress thought that some at

least of the "statutory laws of the United States" were "not locally inapplicable". Otherwise, it would not have provided as it did provide in both Organic Acts that "the statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Porto Rico as in the United States." It also thought that such a provision might be desirable in one unincorporated territory and at the same time undesirable in another. Hence, the express provision in the Organic Act for the Philippines passed in 1902 to the effect that section 1891 of the Revised Statutes of 1878 should not apply to those islands. Dorr v. United States, *supra*, at page 143. In Kopel v. Bingham, 211 U. S. 468, the Supreme Court held that Puerto Rico, although not a territory incorporated into the United States, is a completely organized Territory and that section 5278 of the United States Revised Statutes "was not locally inapplicable" within the meaning of section 14 of the Foraker Act. This case is ample authority, if authority be needed, for the conclusion that a federal statute enacted before any distinction had been drawn between territories and unincorporated territories and in terms applicable to any "State or Territory" may be "not locally inapplicable" notwithstanding the fact that Puerto Rico is an unincorporated territory. See also American Railroad Company of P. R. v. Didricksen, 227 U. S. 145, and National City Bank v. Domenech, 47 P. R. R. 29.

In Peck Steamship Line v. New York & P. R. S. S. Co., 2 P. R. Fed. 109, 128, decided in 1906, Judge Rodey, of the United States District Court for Puerto Rico, said:

> "* * * It is difficult to see what is locally inapplicable about that portion of the antitrust act applicable to territories * * *. To our mind, for the pur-

poses of this particular decision, it is not important whether, as a matter of fact or law, Porto Rico is entirely within the definition of an 'organized territory'. Whether it is sufficiently a territory to come within the terms of section 3 of the antitrust act aforesaid, which denounces certain acts 'in restraint of trade or commerce in any territory of the United States,' etc., is what is to be decided here.

"Attorney General Knox, in his opinion regarding trademarks, 23 Ops. Atty. Gen. 635, stated: 'Porto Rico has been fully organized under a law of Congress providing the details of its government, and organized, for the most part, upon the plan adopted for the territories contiguous to the states of the Union. The presumption from the whole tenor of this organic act is that a liberal construction of the provision extending the laws of the United States would comport with the design of Congress. • • •

"Attorney General Griggs, on June 2, 1900, held (23 Ops. Atty. Gen., p. 169) that by virtue of section 14 of the Foraker Act, the laws of the United States relative to the organization and powers of national banks were extended to Porto Rico. • • •

"Hoyt, Acting Attorney General, on July 15, 1902, (24 Ops. Atty. Gen., p. 86), held that the Foraker Act gives force and effect in Porto Rico to the immigration act of Congress of 1882. This latter is a law that was enacted eighteen years previous to the Foraker Act. (p. 130.)

"It is held by the Supreme Court of the United States, in the case of J. Ribas e Hijo, v. United States, 194 U. S. 315, 48 L. ed. 994, 24 Sup. Ct. Rep. 727, that: 'An action which could be brought under the Tucker Act (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752) against the United States, in either a district or a circuit court of the United States, is within the cognizance of the district court

of the United States for Porto Rico.' The Tucker Act is a long one, with some fifteen sections in it, and nowhere refers to a territory, yet, under the provisions of the Foraker Act, making all laws of the United States not locally inapplicable, the law in Porto Rico, and giving this court the jurisdiction of a circuit and district court of the United States (section 34, Foraker act), the Supreme Court held that it was in force here.

"It would appear that Porto Rico is in fact more of an organized territory than some of the older jurisdictions, because it has what no other territory, save Hawaii, has: that is, a separate court of the United States, presumably to enforce United States laws as a part of its jurisdiction, wholly distinct from the local insular courts, which form a complete and ample local system in themselves. • • •

"In the case at bar, we fail to see how the antitrust act is locally inapplicable in itself. On the contrary, it is locally very applicable and a salutary provision of law that the island badly needs if it is not in force already. We therefore hold that the act of Congress in question, for the purposes of this suit, at least, is not locally inapplicable, under the complaint, and is, or at least that portion of it referring to territories in full force in Porto Rico. (P. 132.)"

Some six months after the decision in the Peck case, the Insular Legislature, either concurring in the view of Judge Rodey that the Sherman act, if not already in force in Puerto Rico, was a salutary statute which the island greatly needed, or else arriving independently at the same conclusion, passed the local antitrust law. Seven years later Congress included Puerto Rico in the Clayton Act.

In this there was no coercion. A jury system may be unadvisable and undesirable in "a Spanish and civil law country". Thus far no reason has been suggested why an antitrust law should be necessarily unsuited to the needs of such a country. In any event both the people of Puerto Rico in 1907 and Congress in 1914 have voiced the opinion that an antitrust law was needed in Puerto Rico. We are not now prepared to say, more than a quarter of a century since the enactment of the local law and some two decades after the passage of the Clayton Act, that both Congress and the Insular Legislature were mistaken and that the Sherman Act is "locally inapplicable". Even if it could be said that the Sherman Act was locally inapplicable in 1900 or in 1907 or in 1914 or in 1917 it would not follow that it is so today. Even without the action of Congress or of the local legislature, recent events, of which we may take judicial notice as a matter of current history, would point to the conclusion that the Sherman Act is not now locally inapplicable.

If the Sherman Act alone covered the entire ground of the local law of 1907 then that law was a futile attempt to regulate matters which were not a rightful subject of legislation. If the local law ever went into effect, it was superseded by the Sherman Act as supplemented and expanded by the Clayton Act. El Paso & Northeastern Railway Co. v. Gutiérrez, 215 U. S. 87.

We have not overlooked the fact that in the instant case there is no conflict between the local law and the federal statute. It is also true that in the Gutiérrez case there was a conflict between the New Mexico and the Federal Employers' Liability Act. The Supreme Court, however, in-

stead of stressing this aspect of the case, rested its decision squarely on the ground that the Federal statute regulating commerce in the territories had superseded the territorial law on the same subject. This court, of course, is bound by that decision and the doctrine thereof which does not appear to have been qualified or modified by any subsequent decision of the Supreme Court must control our disposition of the case at bar.

The order of the district court refusing to set aside its previous restraining order, or so much thereof as provides for relief under the terms of the local antitrust law of 1907 as the sole basis for such relief, will be annuled and, giving the People of Puerto Rico the benefit of any doubt that may arise as to certain questions which we have not discussed nor decided herein, the case will be remanded for such further proceedings in the district court as may be within its jurisdiction, proper in the present action, and not inconsistent herewith.

(Sgd.) H. M. HUTCHISON
Associate Justice.